

April 27, 2015

*VIA CERTIFIED MAIL  
RETURN RECEIPT REQUESTED*

Cree Partridge, Owner  
Berkeley Marine Center, Inc.  
1 Spinnaker Way  
Berkeley, California 94710

Agent for Service of Process  
City of Berkeley  
City Clerk  
2180 Milvia Street, 1st Floor  
Berkeley, California 94704

Agent for Service of Process  
Berkeley Marine Center, Inc.  
Christopher Partridge  
1 Spinnaker Way  
Berkeley, California 94710

**Re: Notice of Violation and Intent to File Suit under the Clean Water Act**

Dear Sirs:

I am writing on behalf of San Francisco Baykeeper ("Baykeeper") to give notice that Baykeeper intends to file a civil action against Berkeley Marine Center, Inc. and the City of Berkeley (collectively, "BMC") for violations of the Federal Water Pollution Control Act, 33 U.S.C. § 1251 *et seq.* ("Clean Water Act" or "CWA") at BMC's facility located at 1 Spinnaker Way, Berkeley, California (the "Facility").

Baykeeper is a non-profit public benefit corporation organized under the laws of California, with its office in Oakland, California. Baykeeper's purpose is to protect and enhance the water quality and natural resources of San Francisco Bay, its tributaries, and other waters in the Bay Area, for the benefit of its ecosystems and communities. Baykeeper has over three thousand members who use and enjoy San Francisco Bay and other waters for various recreational, educational, and spiritual purposes. Baykeeper's members' use and enjoyment of these waters are negatively affected by the pollution caused by BMC's operations.

This letter addresses BMC's unlawful discharge of pollutants from the Facility via stormwater into San Francisco Bay. Specifically, Baykeeper's investigation of the Facility has uncovered significant, ongoing, and continuous violations of the CWA and the National Pollutant Discharge Elimination System ("NPDES") General Permit No.



Pollution hotline: 1 800 KEEP BAY  
[www.baykeeper.org](http://www.baykeeper.org)

1736 Franklin Street, Suite 800  
Oakland, CA 94612  
(510) 735-9700

## **B. The Affected Water.**

San Francisco Bay is a water of the United States. The CWA requires that water bodies such as San Francisco Bay meet water quality objectives that protect specific "beneficial uses." The beneficial uses of San Francisco Bay and its tributaries include commercial and sport fishing, estuarine habitat, fish migration, navigation, preservation of rare and endangered species, water contact and non-contact recreation, shellfish harvesting, fish spawning, and wildlife habitat. Contaminated stormwater from the Facility adversely affects the water quality of the San Francisco Bay watershed and threatens the beneficial uses and ecosystem of this watershed, which includes significant habitat for listed rare and endangered species.

## **II. THE ACTIVITIES AT THE FACILITY CONSTITUTE VIOLATIONS OF THE CLEAN WATER ACT.**

It is unlawful to discharge pollutants to waters of the United States, such as San Francisco Bay, without an NPDES permit or in violation of the terms and conditions of an NPDES permit. CWA § 301(a), 33 U.S.C. § 1311(a); *see also* CWA § 402(p), 33 U.S.C. § 1342(p) (requiring NPDES permit issuance for the discharge of stormwater associated with industrial activities). The Industrial Stormwater Permit authorizes certain discharges of stormwater, conditioned on compliance with its terms.

In 1998, BMC submitted a Notice of Intent ("NOI") to be authorized to discharge stormwater from the Facility under the Industrial Stormwater Permit. However, information available to Baykeeper indicates that stormwater discharges from the Facility have violated several terms of the Industrial Stormwater Permit, thereby violating the CWA. Apart from discharges that comply with the Industrial Stormwater Permit, the Facility lacks NPDES permit authorization for any other discharges of pollutants into waters of the United States.

### **A. Discharges in Excess of BAT/BCT Levels.**

The Effluent Limitations of the Industrial Stormwater Permit prohibit the discharge of pollutants from the Facility in concentrations above the level commensurate with the application of best available technology economically achievable ("BAT") for toxic pollutants<sup>2</sup> and best conventional pollutant control technology ("BCT") for conventional pollutants.<sup>3</sup> Industrial Stormwater Permit, Order Part B(3). EPA has published Benchmark values set at the maximum pollutant concentration present if an industrial facility is employing BAT and BCT, as listed in Attachment 1 to this letter.<sup>4</sup>

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<sup>2</sup> BAT is defined at 40 C.F.R. § 442.23. Toxic pollutants are listed at 40 C.F.R. § 401.15 and include copper, lead, and zinc, among others.

<sup>3</sup> BCT is defined at 40 C.F.R. § 442.22. Conventional pollutants are listed at 40 C.F.R. § 401.16 and include BOD, TSS, oil and grease, pH, and fecal coliform.

<sup>4</sup> The Benchmark values are part of EPA's Multi-Sector General Permit ("MSGP") and can be found at: [http://www.epa.gov/npdes/pubs/msgp2008\\_finalpermit.pdf](http://www.epa.gov/npdes/pubs/msgp2008_finalpermit.pdf). *See* 73 Fed. Reg. 56,572 (Sept. 29, 2008)

the San Francisco Bay Basin (Region 2) Water Quality Control Plan ("Basin Plan").<sup>7</sup> *See* Attachment 1. Exceedances of WQS are violations of the Industrial Stormwater Permit, the CTR, and the Basin Plan.

The Basin Plan establishes WQS for San Francisco Bay and its tributaries, including but not limited to the following:

- Waters shall not contain substances in concentrations that result in the deposition of material that cause nuisance or adversely affect beneficial uses.
- Waters shall not contain suspended material in concentrations that cause nuisance or adversely affect beneficial uses.
- Waters shall be free of changes in turbidity that cause nuisance or adversely affect beneficial uses. Increases from normal background light penetration or turbidity relatable to waste discharge shall not be greater than 10 percent in areas where natural turbidity is greater than 50 NTU.
- All waters shall be maintained free of toxic substances in concentrations that are lethal to or that produce other detrimental responses in aquatic organisms.
- Surface waters shall not contain concentrations of chemical constituents in amounts that adversely affect any designated beneficial use. The Basin Plan, Table 3-3, identifies specific marine water quality objectives for toxic pollutants.<sup>8</sup>

Baykeeper alleges that BMC's stormwater discharges have caused or contributed to exceedances of the WQS set forth in the Basin Plan and CTR. These allegations are based on BMC's self-reported data submitted to the San Francisco Bay Regional Water Quality Control Board, which indicates exceedances of receiving water limits for pH, copper, and zinc. *See* Attachment 1.

Baykeeper alleges that each day that BMC has discharged stormwater from the Facility, BMC's stormwater has contained levels of pollutants that exceeded one or more of the applicable WQS in the San Francisco Bay. Baykeeper alleges that BMC has discharged stormwater exceeding WQS from the Facility to San Francisco Bay during at least every significant local rain event over 0.1 inches in the last five (5) years. *See* Attachment 2. Each discharge from the Facility that has caused or contributed, or causes or contributes, to an exceedance of an applicable WQS constitutes a separate violation of

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<sup>7</sup> The Basin Plan is published by the San Francisco Bay Regional Water Quality Control Board at: [http://www.waterboards.ca.gov/sanfranciscobay/basin\\_planning.shtml#2004basinplan](http://www.waterboards.ca.gov/sanfranciscobay/basin_planning.shtml#2004basinplan) (Last accessed on 4/18/15).

<sup>8</sup> Basin Plan, Table 3-3 is available at: [http://www.waterboards.ca.gov/rwqcb2/water\\_issues/programs/planningtmdls/basinplan/web/tab/tab\\_3-03.pdf](http://www.waterboards.ca.gov/rwqcb2/water_issues/programs/planningtmdls/basinplan/web/tab/tab_3-03.pdf) (Last accessed on 4/18/15).

MRP ensure that each facility's stormwater discharges comply with the Discharge Prohibitions, Effluent Limitations, and Receiving Water Limitations specified in the Industrial Stormwater Permit. *Id.* at Section B(2). Facility operators must ensure that their MRP practices reduce or prevent pollutants in stormwater and authorized non-stormwater discharges as well as evaluate and revise their practices to meet changing conditions at the facility. *Id.* This may include revising the SWPPP as required by Section A of the Industrial Stormwater Permit.

The MRP must measure the effectiveness of BMPs used to prevent or reduce pollutants in stormwater and authorized non-stormwater discharges, and facility operators must revise the MRP whenever appropriate. *Id.* at Section B(2). The Industrial Stormwater Permit requires facility operators to visually observe and collect samples of stormwater discharges from all drainage areas. *Id.* at Section B(7). Facility operators are also required to provide an explanation of monitoring methods describing how the facility's monitoring program will satisfy these objectives. *Id.* at Section B(10).

BMC has been operating the Facility with an inadequately-developed and/or inadequately-implemented MRP, in violation of the substantive and procedural requirements set forth in Section B of the Industrial Stormwater Permit. For example, the data in Attachment 1 indicates that BMC's monitoring program has not ensured that stormwater discharges are in compliance with the Discharge Prohibitions, Effluent Limitations, and Receiving Water Limitations of the Industrial Stormwater Permit as required by Section B(2). The monitoring program has not resulted in practices at the Facility that adequately reduce or prevent pollutants in stormwater as required by Section B(2). Similarly, the data in Attachment 1 indicate that BMC's MRP has not effectively identified or responded to compliance problems at the Facility or resulted in effective revision of BMPs in use or the Facility's SWPPP to address such ongoing problems as required by Section B(2).

As a result of BMC's failure to adequately develop and/or implement an adequate MRP at the Facility, BMC has been in daily and continuous violation of the Industrial Stormwater Permit and the CWA each and every day for the past five (5) years. These violations are ongoing. BMC will continue to be in violation of the monitoring and reporting requirements each day that BMC fails to adequately develop and/or implement an effective MRP at the Facility. BMC is subject to penalties for each violation of the Industrial Stormwater Permit and the CWA occurring for the last five (5) years.

#### **E. Discharges Without Permit Coverage.**

Section 301(a) of the CWA prohibits the discharge of any pollutant into waters of the United States unless the discharge is authorized by a NPDES permit issued pursuant to section 402 of the CWA. *See* 33 U.S.C. §§ 1311(a), 1342. BMC sought coverage for the Facility under the Industrial Stormwater Permit, which states that any discharge from an industrial facility not in compliance with the Industrial Stormwater Permit "must be either eliminated or permitted by a separate NPDES permit." Industrial Stormwater Permit, Order Part A(1). Because BMC has not obtained coverage under a separate

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Baykeeper will seek to recover attorneys' fees, experts' fees, and costs in accordance with CWA section 505(d), 33 U.S.C. § 1365(d).

As noted above, Baykeeper is willing to meet with you during the 60-day notice period to discuss effective remedies for the violations noted in this letter. Please contact Nicole or George to initiate these discussions.

Sincerely,



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Nicole C. Sasaki  
Associate Attorney  
San Francisco Baykeeper

Cc:

Gina McCarthy Administrator US EPA, William Jefferson Clinton Bldg. 1200 Pennsylvania Avenue, N.W. Mail Code: 1101A Washington, DC 20460	Bruce Wolfe Executive Officer Regional Water Quality Control Board San Francisco Bay Region 1515 Clay Street, Suite 1400 Oakland, CA 94612
Jared Blumenfeld Regional Administrator U.S. EPA - Region 9 75 Hawthorne Street San Francisco, CA 94105	Thomas Howard Executive Director State Water Resources Control Board 1001 I Street Sacramento, CA 95814



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